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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE GUADALUPE CASTILLO, Defendant and Appellant.	H041520 (Santa Clara County Super. Ct. No. C1351660)

A jury convicted defendant Jose Guadalupe Castillo of two counts of sexual penetration of a child 10 years of age or younger (Pen. Code, § 288.7, subd. (b))[1] and three counts of lewd and lascivious acts by force, menace, or duress on a child under the age of 14 (§ 288, subd. (b)(1)). All five counts involved S. Doe[2] (hereafter S.), the daughter of defendant's friends and housemates. The trial court sentenced defendant to a prison term of 30 years to life consecutive to 20 years. On appeal, defendant asserts evidentiary and instructional errors. We shall affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Defendant is Charged

The Santa Clara County District Attorney filed an information on October 10, 2013 charging defendant with two counts of sexual penetration of a child 10 years of age or younger (counts 1 and 2, § 288.7, subd. (b)) and three counts of lewd and lascivious

[1] Further unspecified statutory references are to the Penal Code unless otherwise indicated.

[2] We refer to the victim by her first initial for privacy reasons.

acts by force, menace, or duress on a child under the age of 14 (counts 3, 4, and 5, § 288, subd. (b)(1)). The information alleged that the conduct underlying counts 1, 2, 4, and 5 occurred between January 1, 2007 and March 4, 2013. It further alleged that defendant performed the lewd and lascivious act charged in count 3 on March 3, 2013, when S. was 7 years old.

B. Evidence Adduced at Defendant's Second Trial

Defendant's first trial resulted in a mistrial after the jury was unable to reach any verdicts. At his second trial, in July 2014, the following evidence was adduced.

1. S.'s Mother

S.'s mother testified that she and her husband have two daughters, S. and Y.[3] At the time of trial, S. had just finished the third grade and Y. was three years old. The family lived in a two-bedroom duplex in San Jose. They had moved there six or seven years earlier from an apartment complex, where defendant was their neighbor. S. was a toddler at the time of the move. Defendant rented a bedroom in the duplex from S.'s mother and father. According to S.'s mother, they considered defendant family. S. and Y. called him Nino, meaning godfather. Defendant frequently took S. places, including the park, his work, and the store, where he bought her candy.

On the evening of March 3, 2013, two days before S.'s eighth birthday, S. and Y. went to defendant's room after dinner. They frequently watched cartoons in there. S.'s mother went into the room without knocking, intending to bathe the girls. When she entered, she saw defendant and S. lying on the bed under a blanket. They were on their sides facing each other. Defendant was not wearing a shirt. When S.'s mother entered, defendant turned away from her toward the wall. S.'s mother "didn't know what to say." She went to the bedroom she and her husband shared with their daughters to find her husband. S. followed her mother. According to S.'s mother, S. covered her face and lay

[3] S.'s mother testified through a Spanish-language interpreter. All quotations from her testimony are taken from the interpreter's English translation.

down on the bed. She told her mother that defendant "wanted [her] to touch him," indicating that she meant his penis. S. was crying and repeatedly told her parents it was not her fault.

S.'s mother, S.'s father, and S. went to the defendant's room to confront him. Defendant told them S. "was touching him" and "wanted to touch him" and he told her "to not do that." Defendant appeared nervous to S.'s mother. He looked down at his phone and avoided eye contact. Later that evening, S. told her mother this was not the first time defendant had made her touch him. S.'s mother demonstrated at trial the hand movement S. told her the defendant made her use by putting her fingers and thumb together and making an up and down motion. S. also told her mother that defendant had touched her private part and that it hurt when he did so.

The following morning, S.'s mother called her landlady, who worked in probation, for guidance. The landlady said she would report the abuse.

S.'s mother testified on direct examination that she responded to letters defendant wrote to her while he was in jail. She said she did so because she wanted to know what he had done to her daughter. On cross-examination, S.'s mother admitted to writing four or five letters to defendant. She reiterated that he wrote first and she "just answered." She could not recall whether she had asked defendant what he had done to S. in two particular letters, written in July and December. She refused to look at those letters to try to refresh her recollection.

S.'s mother also acknowledged on cross-examination that she tried to visit defendant in jail and that she loved defendant, although she denied having an affair with him. She also denied fighting with her husband after the preliminary hearing, during which defense counsel accused her of having a romantic relationship with defendant.

S.'s mother denied ever hitting S. with a sandal or a belt.

S.'s mother testified that she took S. to the doctor two or three weeks after the March 3, 2013 incident because S. complained her private parts hurt; the doctor

determined S. had a urinary tract infection. Defense counsel attempted to impeach S.'s mother with her preliminary hearing testimony that she did not take S. to the doctor for an examination "relative to the sex abuse allegations." S.'s mother responded that she was not permitted to answer the relevant question at the preliminary hearing and declined to look at the transcript to refresh her recollection.

Finally, S.'s mother testified on cross-examination that S. did not say she saw white stuff come out of defendant's penis. Defense counsel attempted to impeach S.'s mother with her preliminary hearing testimony but S.'s mother again declined to look at the transcript to refresh her recollection.

2. S.'s Father

S.'s father testified that his daughters frequently played and watched television in defendant's room. Defendant took them places, including to the store to buy candy. S. regularly asked to go to the store with defendant. S.'s father told S. to listen to defendant and do what he said while they were on outings. Defendant was like a brother to S.'s father.

On the evening of March 3, 2013, S.'s father was resting in the bedroom when his wife came in. She told him she had seen defendant and S. in bed together. S. followed her mother into the room, crying and saying "I don't want to do it. He want [*sic*] me to do it." When S.'s father asked what she meant she said "touch [his] penis." S.'s father ran to defendant's room and asked him what was going on. At first, defendant ignored S.'s father and looked down at his phone. Then, without looking S.'s father in the eye, defendant said "your daughter want [*sic*] to touch my penis. But I tell her no don't do that because I want to tell your mommy and your dad." Later that evening, S. said defendant had touched her vagina. She said similar touching had happened many times.

S.'s father testified that he was not upset by accusations made at the preliminary hearing that his wife had had an affair with defendant. He denied fighting with his wife during the preliminary hearing.

3. S.

S. was nine years old at the time of trial. She testified that defendant "was making [her] touch his private" when he lived with her family. He would pull down his zipper, expose himself, grab her hand, and make her "shake" his penis. Initially, she testified that the first time he made her touch him was the time her "mom walked in and she saw." Later, she testified that it had happened previously as well, including when her family lived in the apartment and in defendant's car. She also stated that she thought the abuse started when she was six or seven years old. When asked whether defendant made her touch him "a lot or not so much," the victim responded, "I forgot." Later, the prosecutor asked whether defendant made her touch him "every day or not every day." She responded "every day."

S. testified that when defendant would make her touch him, she "said no, but he kept on doing it." He told her not to tell anybody. At first, she could not remember what he said would happen if she told anyone. Later, she testified he said he would burn her hand and tongue if she told. She also was afraid her mom would yell at her if she told her about the abuse.

S. further testified that defendant had touched her "private" inside her underwear using his finger. She recalled him doing so four times, including once while she was watching television in the living room and once in his bedroom. Initially, S. testified it did not hurt when defendant touched her. When she was reminded by the prosecutor that she previously had testified that it hurt a lot she said "[i]t hurt a little bit." On cross-examination, S. testified that the defendant only touched her over her clothes.

S. testified that she and the defendant were in the defendant's bed watching television on the night her mom walked into the room. On cross-examination, S. stated that she could not remember where she was sitting or if her sister was in the room. Then she recalled that she and her sister were sitting in a chair in defendant's room. She said she was "confused" about what happened that night and that she was having trouble

remembering because of "all the questions that you guys asked me." Toward the end of cross-examination, S. testified that the defendant told her to touch his "private" on the night her mom walked in, but she did not remember whether she did or not. She then testified that she did not put her hand inside his shorts that night.[4]

Also on cross-examination, S. initially denied that her parents ever punished her by hitting her with a belt or sandal. However, she acknowledged they did so after being reminded that she told a social worker her parents sometimes hit her with a belt or sandal.

Defense counsel asked S. on cross-examination whether she ever saw white stuff come out of defendant's penis. At first, she responded, "I don't know if I saw it, yes or no. Yes." She then said, "No. I mean no. I'm confused right now," and requested a break. After a five-minute break, S. stated that she didn't "know which one it is." S. agreed that she told police and testified at the preliminary hearing that she never saw anything come out of defendant's penis. She then remembered that she did not see white stuff come out of defendant's penis.

4. Kristin B.

Kristin B., the principal at S.'s school, received a phone call on March 4, 2013 from S.'s parents' landlady. The landlady said she had reason to believe S. had been sexually abused. Kristen B. brought S., then a second grader, into her office and asked S. whether there was anything happening at home that she was uncomfortable with. S. responded that somebody she was living with asked her to touch his penis. Kristen B. "didn't push very much" for additional details because she had enough information to make a report and "the police would do their investigation."

5. Officer Ashley Weger

San Jose Police Officer Weger testified that she interviewed S. on March 6, 2013. At the time, Weger was assigned to the sexual assault unit. A videotaped recording of the

[4] Near the end of defense counsel's cross-examination, S. twice stated that her head was hurting from all of the questions. She also stated that she was tired.

interview was played for the jury. During the interview, S. said her Nino "wants [her] to touch" his "weenie." She described an incident that occurred the prior Sunday while she and her sister were in her Nino's room. She was sitting on a chair with her sister and her Nino grabbed her hand hard and hurt her shoulder. He made her touch him inside his shorts[5] and "rub" his penis even though she said she did not want to. Afterwards, she went and told her parents.

S. told Weger that defendant made her touch him "a lotta times" while she was six and seven years old. She was unable to describe any other specific incidents, however. S. said she did not tell her parents sooner because she thought they would get mad.

Weger asked S. whether "there [are] parts of your body that he touched?" S. responded "No."

6. Anthony Urquiza, Ph.D.

Dr. Urquiza, a psychologist, testified for the prosecution as an expert on child abuse and child sexual abuse accommodation syndrome (CSAAS). He explained that CSAAS is an educational tool used to describe children who have been abused and to dispel misperceptions or myths about sexually abused children. Thus, it should not be used to diagnose whether a child has been abused. Dr. Urquiza stated that CSAAS describes five common characteristics of children who have been sexually abused: secrecy; helplessness; entrapment and accommodation; delayed and unconvincing disclosure; and retraction.

On cross-examination, Dr. Urquiza agreed that it is not the role of a mental health provider to determine whether the child has been abused or to distinguish a true report from a false one.

On redirect, the prosecutor asked Dr. Urquiza about the frequency of false allegations of child sexual abuse in the context of CSAAS research. Defense counsel

[5] At another point in the interview, she denied that her hand was "inside" and she referred to defendant wearing pants instead of shorts.

objected on the ground the question exceeded the permissible scope of CSAAS evidence. The court overruled that objection, reasoning that defense counsel had opened the door by asking about false reports of child sexual abuse and noting that Dr. Urquiza also was an expert in child abuse. Dr. Urquiza testified that false allegations rarely occur and tend to occur most frequently when there is a conflict between parents, such as during a custody dispute.

7. Rick Schoonover

Los Altos Police community service officer Schoonover testified for the defense. He interviewed S. on the evening of March 4, 2013 at her school. At the time, he was a police trainee in San Jose with little training or experience with child sex abuse cases. The interview took place around 8:00 p.m. The officer training Schoonover also was present for the interview.

Schoonover asked S. whether defendant had touched her body; she said no. She initially told Schoonover that defendant had made her touch his penis twice. Later, she said it was many times. S. said she was afraid to tell her parents about the touching and that if she told, defendant would stop buying her candy.

8. Elizabeth Ponce

Ponce testified that she had known defendant for 10 years. About seven years prior to the trial, defendant shared an apartment with her, her husband, and their young children for about a year. She never saw defendant act inappropriately around her children and she testified she would feel comfortable leaving him alone with them.

S.'s family lived in the same apartment complex as Ponce's family when defendant lived with the Ponces. Ponce testified that she once saw defendant hug S.'s mother from behind while S.'s mother was doing dishes. Ponce observed defendant standing behind S.'s mother with his chest against her back and his hands on the sink on either side of her.

9. Defendant's Character Witnesses

A number of defendant's friends testified that they did not think defendant was the type of person who would commit sex crimes with children. They testified they had seen defendant interact with children (in some cases, their own) and had observed nothing inappropriate in those interactions.

10. Stipulation

The court read the following stipulation after the final witness finished testifying: "During the break at the October 4, 2013, hearing, the interpreter heard yelling coming out of the witness room where [S.'s parents] were."

11. Excerpts From S.'s Mother's Prior Testimony

The trial court allowed defense counsel to read portions of S.'s mother testimony at prior court hearings to the jury, on the ground they constituted prior inconsistent statements. The jury heard that S.'s mother's previously had testified that: (1) she does not hit S.; (2) she did not tell police that S. said defendant put his finger in her vagina; (3) she had not taken S. to the doctor for an examination after learning of the molestations; and (4) S. said she saw "white stuff" come out of defendant's penis "many times."

C. Verdict, Sentencing, and Appeal

After deliberating for less than a full day, the jury rendered guilty verdicts on all counts. The trial court sentenced defendant to an aggregate prison term of 30 years to life consecutive to 20 years on September 26, 2014. The sentence consisted of 15 years to life on count 1, 15 years to life on count 2, the middle term of eight years on count 3, the middle term of six years on count 4, and the middle term of six years on count 5, with all terms running consecutively.[6]

[6] Between January 1, 2005 and September 8, 2010, violations of section 288, subdivision (b)(1) were punishable by imprisonment in the state prison for three, six, or eight years. Since September 9, 2010, such have been punishable by imprisonment in the state prison for five, eight, or 10 years. The current version of section 288, subdivision

Defendant timely appealed on October 2, 2014.

II. DISCUSSION

A. Dr. Urquiza's Testimony

The prosecution's child abuse and CSAAS expert, Dr. Urquiza, testified over defense objections on relevance and other grounds. On appeal, defendant raises a number of claims related to the admission and use of Dr. Urquiza's testimony. We set forth the applicable legal principles before addressing defendant's claims.

1. Legal Principles

a. Admissibility of Expert Testimony

" 'Expert opinion testimony is admissible only if it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." ' [Citation.] 'When expert opinion is offered, much must be left to the trial court's discretion.' [Citation.] The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion. [Citation.]" (*People v. McDowell* (2012) 54 Cal.4th 395, 425-426.)

b. Admissibility of CSAAS Evidence

" 'Expert testimony on the common reactions of a child molestation victim [(i.e., CSAAS evidence)] is not admissible to prove the sex crime charged actually occurred.' " (*People v. Perez* (2010) 182 Cal.App.4th 231, 245 (*Perez*).) In other words, it is impermissible to say "that where a child meets certain criteria, we can predict with a reasonable degree of certainty that he or she has been abused." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 393 (*Bowker*).) Accordingly, courts require that jurors "be instructed simply and directly that the [CSAAS] expert's testimony is not intended and

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(b)(1) applied to count 3, which involved conduct occurring on or around March 3, 2013. Therefore, the middle term was eight years. Because counts 4 and 5 involved conduct that occurred sometime between January 1, 2007 and March 2, 2013, the earlier version of the statute applied, making the middle term six years.

should not be used to determine whether the victim's molestation claim is true." (*Id.* at p. 394) " 'However, CSAAS testimony "is admissible to rehabilitate [the molestation victim's] credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation. [Citations.]" ' " (*Perez, supra,* at p. 245.) In that circumstance, CSAAS evidence is admissible to "disabus[e] a jury of misconceptions it might hold about how a child reacts to a molestation" (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744 (*Patino*)) and to show "that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested." (*Bowker, supra,* at p. 394.)

2. Admission of CSAAS Testimony Was Not an Abuse of Discretion

Defendant argues that California should follow other states in concluding that CSAAS evidence is inadmissible for any purpose for four reasons.

First, defendant asserts that the misperceptions about child sexual assault victims that CSAAS evidence seeks to dispel are no longer widely held, making the evidence irrelevant and the subject within the common understanding of jurors. But " '[t]he jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission . . . . Instead, the statute declares that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men [or women] of ordinary education could reach a conclusion as intelligently as the witness." ' " (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300 (*McAlpin*).) The trial court did not abuse its discretion in concluding that Dr. Urquiza had considerably more knowledge about the behavior of child sexual abuse victims than the average juror such that his testimony was relevant and would assist the jury in understanding S.'s conduct, including her failure to report the abuse.

Second, defendant contends that CSAAS evidence will always be used against the defendant because the syndrome is "amorphous and indefinite." He notes that Dr. Urquiza testified that both delayed reporting (as described by CSAAS) and immediate reporting are consistent with child sexual abuse. Courts have recognized a phenomenon similar to the one defendant points out: that "[t]he particular aspects of CSAAS are as consistent with false testimony as with true testimony." (*Patino*, *supra*, 26 Cal.App.4th at p. 1744.) But rather than exclude otherwise relevant CSAAS testimony, courts have concluded that "the admissibility of such testimony must be handled carefully by the trial court." (*Ibid*.) Defendant offers no reason to depart from the precedent. Nor does he show that the court mishandled the CSAAS evidence. As discussed below, here, the court properly instructed the jury regarding the appropriate use of the CSAAS testimony.

Third, defendant avers CSAAS evidence has not been shown to be based on valid, objective scientific research. Specifically, he suggests research is needed to confirm that typical child sex abuse victims behave in accordance with the CSAAS factors and children who are lying about sexual abuse do not. But such proof is not needed, as CSAAS evidence cannot be used "to determine whether the victim's molestation claim is true. . . . The evidence is admissible *solely* for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested." (*Bowker*, *supra*, 203 Cal.App.3d at p. 394.) Here, Dr. Urquiza explained that CSAAS is not a diagnostic tool, but a therapeutic one used in a setting where it is assumed the child was abused. And jurors were instructed that his testimony could be considered "only in deciding whether or not [S.'s] conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony." To the extent defendant is referring to the *Kelly* test[7] governing the

[7] *People v. Kelly* (1976) 17 Cal.3d 24.

admissibility of expert testimony based on new scientific techniques, it is well established that the admissibility of expert CSAAS testimony is not governed by the *Kelly* test if it is admitted "for the limited purpose of disabusing the jury of misconceptions as to how child victims react to abuse." (*Bowker*, *supra*, at p. 392; *People v. Harlan* (1990) 222 Cal.App.3d 439, 448.) As discussed below, the use of Dr. Urquiza's testimony was so limited here.

Finally, defendant notes that other states have excluded CSAAS evidence as improperly bolstering the credibility of child witnesses. We decline to join those jurisdictions, as defendant urges. To the extent that our Supreme Court has approved the admissibility of CSAAS evidence to rebut misconceptions about the behavior of child sexual abuse victims, we are required to follow that precedent. (*McAlpin*, *supra*, 53 Cal.3d 1289; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*).)

For the foregoing reasons, defendant has failed to show that the trial court abused its discretion in admitting expert CSAAS testimony in this case.

3. Admission of Expert's Testimony That False Accusations Rarely Occur Was Not an Abuse of Discretion

Defendant contends the trial court erred in admitting Dr. Urquiza's testimony about the rate of false allegations of child sexual abuse for three reasons. We find no abuse of discretion.

First, defendant asserts the subject matter was outside the scope of cross-examination. That assertion is meritless. Defense counsel asked Dr. Urquiza, "There is no way to distinguish a true report from a false report in a clinical way, right?" She clarified, "A[s a] clinician . . . , you are not there to determine whether the child is telling the truth or not?" Those questions, which suggested that a report of child sexual abuse is equally likely to be false as it is to be true, opened the door for the admission, on redirect

examination, of testimony regarding false allegations of child sexual abuse, including the frequency of such false allegations.

Second, defendant argues the testimony was irrelevant because research showing that children rarely make false allegations had no tendency in reason to prove whether S. was telling the truth. His trial counsel did not object below on relevance grounds, forfeiting the argument on appeal. (Evid. Code, § 353 ["[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion"].) The claim also fails on the merits. The prosecution did not rely on the false allegation rate evidence to affirmatively prove its case. Rather, it merely elicited the complained-of testimony to rebut the inference that the defense sought to create that a report of child sexual abuse is equally likely to false as it is to be true. The trial court did not abuse its discretion in concluding that rebutting that inference was relevant.

Third, defendant argues that Dr. Urquiza's testimony that false allegations of sexual abuse by children "happen very uncommonly or rarely" constituted improper vouching for S.'s credibility. "The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82 ["a timely and specific objection probably should have been sustained" where psychological expert testifying about battered woman syndrome testified she believed the victim's claims of abuse to be true].) Defendant's claim fails because Dr. Urquiza's testimony did not constitute an opinion on S.'s credibility.

Dr. Urquiza testified that he had no information about the case (other than the defendant's name) and that he had no opinion about whether the victim was sexually abused. He explained, "I don't know anything about this case, [so] it would not be wise for me to have an opinion about something I don't know anything about." He also acknowledged that "false allegations do occur . . . ." In view of Dr. Urquiza's testimony as a whole, no reasonable juror would have understood his testimony about false allegation rates to be an assurance of the truth of S.'s allegations.

Defendant's reliance on *Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732 is misplaced, as that case is factually distinguishable. There, the prosecution's child abuse expert testified that 99.5 percent of children tell the truth and that he "had not personally encountered an instance where a child had invented a lie about abuse." (*Id.* at p. 737.) The expert also testified he had interviewed the complaining child witness. (*Id.* at pp. 737-738.) Thus, he effectively testified that the complaining child witness was not lying about the alleged abuse. By contrast, here Dr. Urquiza did not interview S.

4. The Court Did Not Err in Instructing the Jury with CALCRIM No. 1193

Defendant contends the trial court erred in giving CALCRIM No. 1193 regarding CSAAS evidence. While he acknowledges that CALCRIM No. 1193 is a standard jury instruction, he says it authorizes jurors to rely on expert CSAAS testimony to evaluate the credibility of a complaining witness, in violation of the case law limiting the use of CSAAS evidence. We disagree.

a. Factual Background

The trial court instructed the jury with CALCRIM No. 1193 as follows: "You have heard testimony from Anthony Urquiza regarding child sexual abuse accommodation syndrome. [¶] Anthony Urquiza's testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. [¶] You may consider this evidence only in deciding whether or

not [S.'s] conduct was not inconsistent with the conduct of someone who has been molested and *in evaluating the believability of her testimony*." (Italics added.) On appeal, defendant takes issue with the final, italicized phrase.

b. Forfeiture

Defense counsel did not object to the instruction at trial. Accordingly, the People argue that defendant forfeited this claim. Defendant responds that section 1259 permits him to challenge the instruction on appeal.

Section 1259 provides, in relevant part, that a reviewing court "may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." In the context of section 1259, a defendant's substantial rights are affected where the trial court committed reversible error under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (See *People v. Lawrence* (2009) 177 Cal.App.4th 547, 553, fn. 11; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.) Thus, "[a]scertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice [under *Watson*] if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) We therefore turn to the merits of defendant's claim.

c. Legal Principles and Standard of Review

"We determine whether a jury instruction correctly states the law under the independent or de novo standard of review." (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 (*Ramos*).) The pertinent inquiry is whether the instructions as a whole fully and fairly set forth the applicable law. (*Ibid.*) Where jury instructions are ambiguous or internally inconsistent, and therefore subject to an erroneous interpretation, we assess whether there is a " 'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 (*Estelle*).) If there is such a reasonable likelihood, then we consider whether the

instructional ambiguity was prejudicial. (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1171.)

d. Analysis

Defendant argues that using CSAAS evidence to "evaluat[e] the believability of [the victim's] testimony" is equivalent to using the evidence "to determine whether the victim's molestation claim is true," something case law prohibits. (*Bowker*, *supra*, 203 Cal.App.3d at p. 394 ["the jury must be instructed simply and directly that the expert's [CSAAS] testimony is not intended and should not be used to determine whether the victim's molestation claim is true"].)

As discussed above, CSAAS evidence "is not admissible to prove that the complaining witness has in fact been sexually abused[. But] it is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation." (*McAlpin*, *supra*, 53 Cal.3d at p. 1300.) Here, there was evidence that S. engaged in conduct that might appear inconsistent with molestation (and thus undermine S.'s credibility), including not disclosing the abuse. Dr. Urquiza testified that CSAAS is an educational tool designed to dispel myths and misperceptions about child sexual abuse, such as that an abused child will immediately tell somebody about the abuse. He testified that it is not a diagnostic tool and thus should not be used to determine whether a particular child has been abused. He disavowed having any opinion as to whether S. was abused. CALCRIM No. 1193 specifically informed the jury that Dr. Urquiza's testimony "is not evidence that the defendant committed any of the crimes charged against him."

In view of the foregoing evidence and CALCRIM No. 1193 as a whole, there is no reasonable likelihood that the jury understood CALCRIM No. 1193 as allowing it to use the CSAAS evidence to determine that defendant sexually abused S. Rather, it is likely the jury properly understood CALCRIM No. 1193 as permitting it to use the CSAAS

evidence in evaluating the believability of S.'s testimony that the molestation occurred, in light of the evidence that she engaged in conduct seemingly inconsistent with the conduct of a child who had been molested. Therefore, we reject defendant's claim.

5. Prosecutorial Misconduct

Defendant maintains the prosecutor committed prejudicial misconduct during closing arguments by encouraging jurors to use the CSAAS evidence for an improper purpose: concluding that defendant used duress to make S. touch his penis, as charged in counts 3, 4, and 5. Anticipating the People's assertion that trial counsel's failure to object to the prosecutor's statements forfeited any claim of prosecutorial misconduct on appeal, defendant argues that the failure to object constituted ineffective assistance of counsel.

a. Factual Background

Counts 3, 4, and 5 charged defendant with lewd and lascivious acts by force, menace, or duress on a child under the age of 14—specifically, forcing S. to touch his penis—in violation of section 288, subdivision (b)(1)). The elements of an offense under that provision are: (1) physical touching of a child under age 14; (2) for the present and immediate purpose of sexually arousing or gratifying the defendant or victim; and (3) the touching was accomplished by use of force, violence, duress, menace, or fear of injury. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1171.) " '[D]uress as used in the context of section 288 [means] a direct or implied threat of force, violence, danger, *hardship* or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' " (*People v. Leal* (2004) 33 Cal.4th 999, 1004.)

In her closing argument, the prosecutor told the jury it could convict defendant of the section 288, subdivision (b)(1) counts based on his use of force, duress, or menace. With regard to force, the prosecutor noted that S. testified that defendant would pull her arm when he forced her to touch him, which hurt. As to duress, she stated that "in most

cases where you have a perpetrator who lives in the home, who has that disciplinary role, who has that family status, that creates a certain expectation. [¶] Dr. Urquiza talked a lot about it. But the power control specter is all over. The more close in proximity and close in familial connection the less power the victim has. The more power the perpetrator has. [¶] In this case, we know that this is a man who spent a lot of time with her. As Dr. Urquiza said sometimes the threats are actually . . . [l]ess overt. But sometimes they are the subtle sort of bribery types of ways. And here we have somebody who took her to the store. Every time bought her candy. [¶] Every time. Treated her great. Took her all kinds of places. Let her play in his room. Put on the cartoons for her. [¶] You also have testimony from . . . her dad[] that he taught [S.] to respect her elders, to obey him. You heard that he is bigger than her and stronger than her. You also heard that when she repeatedly said no, he ignored that. All of those are factors that go into duress." The prosecutor argued there also was evidence of menace—S.'s testimony that defendant threatened to burn her hand or her tongue.

The prosecutor concluded her discussion of counts 3, 4, and 5 by arguing that threats "don't need to be constant. That was one thing that Dr. Urquiza talked a little bit about is the idea that a child sees someone beating their mother, that child has learned to comply. And that the consequences of failure to comply will result in a beating just like mom gets. [¶] How that applies in this context is an idea that once you plant those seeds of duress, those seeds of force, they carry through. He doesn't have to every single time he touches her threaten her as long [as] at the very beginning in order to get her compliance, he is making these threats. He is abusing his relationship status. That carries through. As you heard, children in this situation get stuck. They can't tell. They can't stop it. So they learn to just cope to accept it."

b. Legal Principles

" ' "The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial

with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] . . . [W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." [Citation.]' " (*People v. Carter* (2005) 36 Cal.4th 1215, 1263 (*Carter*).)

" ' "To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument." ' [Citation.] A court will excuse a defendant's failure to object only if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 349.)

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish both that his counsel's performance was deficient and that he suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) The deficient performance component of an ineffective assistance of counsel claim requires a showing that "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." (*Id.* at p. 688.) With respect to prejudice, a defendant must show "there is a reasonable probability"—meaning "a probability sufficient to undermine confidence in the outcome"—"that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.) We "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to

dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id*. at p. 697.)

c. Analysis

Defendant's trial counsel did not object to the prosecutor's comments, forfeiting the contention on appeal that they constituted prosecutorial misconduct. Therefore, we consider whether this failure amounted to ineffective assistance of counsel. We turn immediately to the prejudice prong, as it is easier to resolve the claim on that ground.

The pertinent question is whether the result of the trial would have been different had the prosecutor not relied on Dr. Urquiza's testimony regarding three of the five CSAAS components (helplessness[8], secrecy[9], and entrapment and accommodation[10]) in arguing that defendant used duress to get S. to touch his penis. Defendant has failed to show that is the case, and thus has not established prejudice.

Jurors must have credited S.'s testimony, which established that defendant, a man in his 30s, repeatedly molested S. when she was seven years old, possibly beginning when she was several years younger. (*People v. Hale* (2012) 204 Cal.App.4th 961, 979

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[8] The prosecutor argued that "in most cases where you have a perpetrator who lives in the home, who has that disciplinary role, who has that family status, that creates a certain expectation. [¶] Dr. Urquiza talked a lot about it. But the power control specter is all over. The more close in proximity and close in familial connection the less power the victim has. The more power the perpetrator has." Dr. Urquiza testified, regarding the CSAAS category of helplessness, that "[t]he closer the proximity between the perpetrator and the victim, the more power that perpetrator has."

[9] The prosecutor said: "That was one thing that Dr. Urquiza talked a little bit about is the idea that a child sees someone beating their mother, that child has learned to comply. And that the consequences of failure to comply will result in a beating just like mom gets." Dr. Urquiza testified, in the context of the secrecy category of CSAAS, that a child who sees his mother being beaten is going to keep quiet about sexual abuse by her abuser.

[10] The prosecutor said: "As you heard, children in this situation get stuck. They can't tell. They can't stop it. So they learn to just cope to accept it." Dr. Urquiza testified that the CSAAS category of entrapment means "you can't stop it from happening . . . you are trapped or stuck." He further testified that accommodation refers to how "kids cope with or . . . accommodate the experience [of] being sexually abused."

(*Hale*) [age difference between the defendant and the victim and the defendant's " ' "continuous exploitation of the victim" ' " are relevant to the existence of duress].) The evidence at trial further established that defendant lived with the victim, was considered part of the family, and occupied a position of authority, as S.'s father had taught her to obey defendant. (*Ibid*. [" ' "Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant . . ." is relevant to the existence of duress. [Citation.]' "].) Defendant threatened to burn S.'s hand and tongue if she told anyone about the abuse. (*People v. Cochran* (2002) 103 Cal.App.4th 8, 15, overruled on other grounds as stated in *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12 ["A threat to a child of adverse consequences . . . if [the child] reports . . . the molestation, may constitute a threat of retribution and may be sufficient to establish duress, particularly if the child is young and the defendant is her parent"].) S. testified she did not want to touch defendant's penis but he made her, including by painfully grabbing and yanking her arm. Taken together, the foregoing evidence strongly supported the inference that defendant " 'took advantage not only of his psychological dominance as an adult authority figure, but also of his physical dominance to overcome [S.'s] resistance to molestation. This qualifies as duress.' " (*Hale, supra,* at p. 980.) Given the strong evidence of duress, there is no reasonable probability that the jury would have reached a different verdict without the prosecutor's complained of statements. Accordingly, we reject defendant's ineffective assistance of counsel claim.[11]

B. Exclusion of Impeachment Evidence

Defendant maintains the trial court erred by excluding evidence impeaching S.'s parents on the topic of defendant's relationship with S.'s mother. The court excluded two

[11] Defendant urges us to reach the merits of his prosecutorial misconduct claim, despite his forfeiture, for several reasons, which we need not address. Were we to reach the merits of the claim, we would find any error harmless for the reasons discussed here with regard to prejudice under *Strickland*.

letters S.'s mother wrote to defendant while he was in jail and the testimony of a court interpreter who overheard S.'s parents fighting during the preliminary hearing after S.'s mother was accused of having an affair with defendant. Defendant claims these errors violated his federal constitutional rights to a fair trial, to present a defense, and to confront the prosecution's witnesses.

1. Standard of Review

"We review a trial court's evidentiary rulings for abuse of discretion." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281 (*Shaw*).) This court has explained that "[d]iscretion is abused only when in its exercise, the trial court 'exceeds the bounds of reason, all of the circumstances before it being considered.' [Citation.] There must be a showing of a clear case of abuse *and miscarriage of justice* in order to warrant a reversal. [Citation]." (*Ibid*., italics added.) The erroneous exclusion of evidence causes prejudice to appellant amounting to a " 'miscarriage of justice' " only if "a different result would have been probable if the error had not occurred." (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480; see also Cal. Const., art. I, § 13; Evid. Code, §§ 353, 354; Code Civ. Proc., § 475.) " 'Prejudice is not presumed, and the burden is on the appealing party to demonstrate that a miscarriage of justice has occurred. [Citations.]' [Citation.]" (*Turman v. Turning Point of Central California, Inc*. (2010) 191 Cal.App.4th 53, 58.) It likewise is appellant's burden to establish abuse of discretion. (*Shaw, supra,* at p. 281.)

2. S.'s Mother's Letters to Defendant

a. Factual Background

Defense counsel sought to admit into evidence two of the letters S.'s mother sent to defendant while he was in jail pending trial. In them, she discusses commonplace topics such as work ("I am still working[; S.'s father's] morning job has gotten very bad"), her younger daughter ("she talks more and she makes us laugh with her nonsense"), the family's health ("everybody is sick me and [S.] during Christmas"), and

the holidays ("I couldn't even give them a present this Christmas").[12] She also thanks defendant for "the drawings," which she says the girls hung in their room. In neither letter does she ask what defendant did to S. or whether the girl's accusations are true.

The letters contain the following passages: "I would like to tell you so many things but I get tired of writing ha ha ha not really you know what I mean I can't talk about that and you can't either. One day will I be able to say it to you with my voice and not with my writing?? Well that is all work hard unfortunately we are in this situation and I thank god for softening my heart and being able to wish you luck: T.Q.M[13] [¶] (Why did you let me down this way) [¶] . . . So many questions and there are no answers It is not hate simply a broken heart mixed feelings"; "I have all of those memories in my mind and in my heart which you broke into pieces But god helps me because I feel a great emptiness that is so big that I don't know If a [*sic*] can deal with it"; "Really today these days I have not been well but anyway you insist on hurting us more and I was thinking about not writing to you any more since I am trying to leave the past behind. you say that you will fight to the end and all I can say to you is that you have the right to do whatever you decide to do if you believe you are innocent only god and you [*sic*] conscience know it."

The court excluded the letters on hearsay grounds. However, the court ruled that defense counsel could use the letters to impeach S.'s mother to the extent her testimony was inconsistent with the letters.

On cross-examination, defense counsel asked S.'s mother whether she gave defendant her phone number in one of her letters. The court sustained an objection to that question on hearsay grounds. The court also sustained a hearsay objection to defense

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[12] The letters were translated from Spanish to English. All quotations from the letters are taken from the English translations.

[13] A translator's note indicates that T.Q.M. stands for "I love you a lot." S.'s mother also testified that T.Q.M. means "I love you a lot."

counsel's question "In one of your letters, did you suggest that [defendant] give you his white truck?"

b. Assumed Error and Harmless Error Standard

Defendant contends the court erred in excluding the letters and preventing cross-examination regarding statements in the letters on hearsay grounds. He reasons that the full text of the letters qualified as prior inconsistent statements because, contrary to S.'s mother's testimony, the letters did not inquire about S.'s allegations. We shall assume the letters were admissible and consider whether that assumed error requires reversal.

Defendant and the People disagree as to the appropriate standard of review. Defendant argues that the assumed error violated his federal constitutional rights, such that the harmless-beyond-a-reasonable-doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) applies. The People say *Watson* applies, such that reversal is required only if it is reasonably probable that the admission of the evidence would have resulted in a verdict more favorable to defendant. We agree with the People.

"Where a 'trial court's ruling did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense,' the ruling does not constitute a violation of due process and the appropriate standard of review is whether it is reasonably probable that the admission of the evidence would have resulted in a verdict more favorable to defendant." (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1317.) As discussed below, the letters did tend to undermine S.'s mother's credibility. But the jury heard other evidence challenging her credibility. "In the context of this other evidence, [the letters were] not critical and [their] exclusion did not preclude defendant from presenting his defense based on [S.'s mother's] lack of credibility." (*Id.* at p. 1318.)

The Sixth Amendment provides that a criminal defendant has the right to confront and cross-examine witnesses against him or her. (U.S. Const., 6th & 14th Amends.; *Pointer v. Texas* (1965) 380 U.S. 400, 403-405.) " ' "[A] criminal defendant states a

violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' " [Citations.] However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.] Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witness's] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]' [Citations.]" (*People v. Virgil* (2011) 51 Cal.4th 1210, 1251.) As discussed below, defense counsel successfully impeached S.'s mother with her prior testimony. Defendant does not show that the letters would have produced a significantly different impression of her credibility. Thus, there were no federal constitutional violations and *Watson* applies.

c. Any Error in Excluding the Letters Was Harmless

Defendant argues the erroneous exclusion of the letters was prejudicial because it hampered his attempts to impeach S.'s mother. He contends the letters impeached S.'s mother by (1) casting doubt on her testimony that she and defendant were not romantically involved; (2) supporting an inference that she falsely testified against defendant in order to hide their affair; and (3) contradicting S.'s mother's testimony about the content of her letters to defendant.

Defendant's claim that the letters evince a romantic relationship between S.'s mother and defendant depends on several ambiguous passages. In them, S.'s mother (1) refers to having a "broken heart," (2) accuses defendant of breaking her memories and leaving her with "great emptiness," and (3) writes "I thank god for softening my heart

and being able to wish you luck: T.Q.M. [I love you a lot]." Those passages are hardly conclusive evidence of an affair. While they reasonably can be read as referring to love lost, they also can be construed as referring to S.'s accusations of sexual abuse. Given the context of defendant's arrest and the pending charges, the latter construction arguably is more reasonable. Regardless, those passages offer only weak support for an inference of an affair. Defendant also points to a passage in which S.'s mother indicates there are things she and defendant cannot write about and wonders whether they will be able to speak one day. Given its cryptic nature, that line offers, at best, marginal support for the alleged affair. In sum, the letters provide slight support for the inference that S.'s mother and defendant had an affair. Therefore, the probative value of the letters for purposes of impeaching S.'s mother regarding the supposed affair was weak.

Defendant's second theory is that, assuming jurors inferred an affair from the letters, they could have further inferred that S.'s mother sought to vilify him in order to hide the affair and "deflect any inquiries into her own behavior, especially after her husband learned of the possible affair." That theory makes no sense in view of the undisputed timeline of the case. S.'s mother reported the alleged abuse to her landlady and discussed it with police in March 2013, seven months before the October 2013 preliminary hearing where the affair accusation first arose. There is no evidence S.'s father suspected an affair earlier and thus no basis to infer that S.'s mother invented the sex abuse allegations in order to hide some illicit relationship.

Finally, defendant maintains that the letters show S.'s mother's testimony to be unreliable. We agree that the letters tend to show S.'s mother was not forthcoming about the nature and extent of her communications with defendant after his arrest. She testified that she merely answered defendant's letters and sought to find out what he had done to her daughter. But the letters show she shared openly with defendant about her life. Nevertheless, we conclude the exclusion of the letters was harmless because the veracity of S.'s mother's testimony was undermined by other evidence: she testified

inconsistently at the preliminary hearing and trial as to whether S. said she saw semen come out of defendant's penis; she testified inconsistently at the preliminary hearing and trial as to whether she took S. to the doctor after learning about the molestations; she testified, contrary to S., that she never hit S. with a belt or sandal; and she was evasive on cross-examination.

For the foregoing reasons, it is not reasonably probable that the admission of the letters would have resulted in a verdict more favorable to defendant.[14]

3. The Interpreter's Testimony

a. Factual Background

At trial, S.'s parents denied having an argument after S.'s mother was accused at the preliminary hearing of having an affair with defendant. Defense counsel sought to impeach them with the testimony of a court interpreter who heard them yelling during the preliminary hearing. The interpreter would have testified that, immediately following S.'s mother's preliminary hearing testimony, he heard yelling coming from the witness room. He opened the door and observed S.'s father and S.'s mother inside. S.'s mother was saying in Spanish "But I didn't. I didn't do that." The interpreter admonished them that they had been instructed not to discuss the case. S.'s father responded that he knew that and would leave.

[14] On reply, defendant advances a new theory of prejudice. He says the inference of an affair would have supported the further inference that he was living with S.'s family to gain access to his lover, not to gain access to S., as the prosecutor argued briefly in her rebuttal closing. That argument is waived. (*People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9 [arguments omitted from opening brief are waived].) Moreover, it is not obvious that one would choose to live with one's lover *and their spouse and children* or that such an arrangement necessarily would facilitate an affair. In light of the weakness of the letters as evidence of an affair, the relative insignificance of the prosecutor's access argument, and the questionable logic underlying defendant's claim that evidence of an affair would have rebutted the access argument, it is not reasonably probable that the admission of the letters would have resulted in a verdict more favorable to defendant.

The trial court excluded the interpreter's testimony under Evidence Code section 352, reasoning that its admission would result in "an undue consumption of time, tend to cause jury confusion, and be misleading on a collateral matter." The court permitted the parties to negotiate a stipulation, which they did. Pursuant to that stipulation, jurors were informed that "[d]uring the break at the October 4, 2013, hearing, the interpreter heard yelling coming out of the witness room where [S.'s parents] were."

b. Legal Principles

A trial court has the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "A trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse of discretion. [Citation.] ' "[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." [Citation.]' " (*People v. Lewis* (2001) 26 Cal.4th 334, 374-375.)

c. Analysis

Applying the foregoing standard, we find no abuse of discretion.

The probative value of the interpreter's testimony is debatable. The interpreter heard only a small portion of the apparent fight, during which S.'s mother denied doing something. When reminded not to discuss the case, S.'s parents did not deny doing so. Accordingly, the interpreter's testimony supported an inference that S.'s parents fought about her testimony. Jurors might reasonably have concluded that they fought about the affair accusation, contrary to their trial testimony, although the interpreter's testimony does not necessarily compel that conclusion. Thus, the interpreter's testimony arguably was probative of the credibility of S.'s parents. Defendant contends the interpreter's testimony also was probative of an affair between S.'s mother and defendant because the

apparent fight indicates that S.'s father believed the affair accusation. We disagree that a husband's suspicion that his wife may have had an affair, apparently based solely on a third-party accusation, is evidence that such an affair actually occurred. In sum, the interpreter's testimony was, at most, moderately probative of S.'s parents' credibility.

On the other side of the scale, allowing the interpreter to testify would have required the court to devote additional time to a collateral matter that could be quickly addressed with a stipulation. Under the circumstances, we conclude the trial court did not abuse its discretion in deciding that any impeachment effect of the testimony was outweighed by the undue consumption of time the questioning would entail.

In any event, any possible error was harmless under both the federal and California standards. (See *Chapman*, *supra*, 386 U.S. at p. 24; *Watson*, *supra*, 46 Cal.2d at p. 836.) The purpose of the interpreter's testimony was to raise an inference that S.'s parents fought about the affair accusation, contrary to their trial testimony. The stipulation accomplished the same thing, thus enabling defendant to attack S.'s parents' credibility.

C. Claimed Instructional Error

Defendant contends the trial court erred by instructing the jury with a modified version of CALCRIM No. 1191, which allowed the jury to consider charged conduct as propensity evidence. He further argues that even if the modified version of CALCRIM No. 1191 is not objectionable on its own, the combined effect of that instruction and the unanimity instruction set forth in CALCRIM No. 3501 was to violate his rights to due process, a presumption of innocence, and determination of each charge beyond a reasonable doubt.

1. Factual Background

The court instructed the jury with the following modified version of CALCRIM No. 1191 on the use of other crimes as propensity evidence: "The People presented evidence that the defendant committed the crimes charged in Counts One, Two, Three,

Four and Five. [¶] These crimes are defined for you in these instructions. [¶] If you decide beyond a reasonable doubt that the defendant committed one of these charged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to have the requisite specific intent for the crimes charged in Counts One, Two, Three, Four or Five, and based on that decision also conclude that the defendant was likely to and did have the requisite specific intent for the other charged offenses alleged in Counts One, Two, Three, Four or Five. [¶] Also, if you decide beyond a reasonable doubt that the defendant committed one of these charged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit the other charged crimes charged in Counts One, Two, Three, Four or Five and based on that decision also conclude that the defendant was likely to and did commit the other offenses of One, Two, Three, Four or Five. [¶] If you conclude beyond a reasonable doubt that the defendant committed a charged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of other charged offenses alleged in Counts One, Two, Three, Four and Five. The People must still prove each element of every charge beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose."

The court also instructed the jury with CALCRIM No. 3501 as follows: "The defendant is charged in Count Three that the crime occurred on or about March 3, 2013. The Defendant is charged in Counts One, Two, Four and Five that the crime occurred sometime during the period of January 1, 2007 to March 2, 2013. [¶] The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense; [¶] OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred

during this time period and have proved that the defendant committed at least the number of offenses charged."

2. Analysis

Defendant challenges the modified version of CALCRIM No. 1191, but acknowledges that under *People v. Villatoro* (2012) 54 Cal.4th 1152, it was proper. As an intermediate appellate tribunal, we are bound by our Supreme Court's holdings. (*Auto Equity Sales, supra*, 57 Cal.2d at p. 455.) Therefore, we reject defendant's claim that *Villatoro* was wrongly decided.

Alternatively, defendant argues that, in cases involving multiple charged offenses based on the same witness's generic testimony alleging ongoing abuse during an undifferentiated time period, the combination of CALCRIM No. 1191 and CALCRIM No. 3501 is unconstitutional. According to defendant, CALCRIM No. 1191 allowed jurors to "take a shortcut to conviction by finding [him] guilty of one act and then inferring that he committed all the acts that [S.] alleged." Under CALCRIM No. 3501, that conclusion that he committed all of the alleged acts allowed jurors to convict on all counts without unanimously agreeing on which act he committed for each offense. His view appears to be that together, CALCRIM Nos. 1191 and 3501 permitted jurors to convict him on all counts simply by agreeing that he committed one of the charged offenses.

Defendant's analysis ignores critical portions of the instructions. (*Ramos, supra*, 163 Cal.App.4th at p. 1088 [" ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . ." ' "].) In the modified version of CALCRIM No. 1191, jurors were instructed that any conclusion that the defendant committed a charged offense "is only one factor to consider along with all the other evidence" and "is not sufficient by itself to prove the defendant is guilty of other charged offenses . . . . The People must still prove each element of every charge beyond a reasonable doubt." Thus, contrary to defendant's claim, jurors could not find him guilty of all charges merely because they determined he

was guilty of one charge. The jury was also instructed, pursuant to CALCRIM No. 220, that defendant was presumed innocent and that the People were required to prove him guilty beyond a reasonable doubt. Finally, CALCRIM No. 3515 instructed jurors to "consider each count separately and return a separate verdict for each one."

These instructions, taken together, " 'fully and fairly instructed on the applicable law.' " (*Ramos*, *supra*, 163 Cal.App.4th at p. 1088.) Defendant has not shown a reasonable likelihood that the jury misunderstood or misapplied them. (*Estelle*, *supra*, 502 U.S. at p. 72.) Accordingly, we reject his claim of instructional error.

D. Cumulative Error

Defendant contends that the cumulative effect of the alleged errors was to deprive him of his right to due process. "Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' " (*People v. Williams* (2009) 170 Cal.App.4th 587, 646 (*Williams*).) "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

Each of the potential errors we have considered is harmless for the reasons stated, whether considered individually or collectively. (*Williams*, *supra*, 170 Cal.App.4th at p. 646.) Therefore, we reject defendant's claim of cumulative error.

III. DISPOSITION

The judgment is affirmed.

_____

ELIA, ACTING P.J.

WE CONCUR:

_____

BAMATTRE-MANOUKIAN, J.

_____

MIHARA, J.